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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 David Sallee,

10 Plaintiff,

11 v.

12 Medtronic Incorporated, et al.,

13 Defendants.
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No. CV-22-00270-TUC-JCH (DTF)

REPORT AND RECOMMENDATION

15 Before the Court is Plaintiff's motion to remand. (Doc. 13) Defendants have also
16 filed a motion to dismiss (Doc. 14) and a motion for summary disposition of the motion to
17 dismiss (Doc. 19). Based on the outcome of the motion to remand, the Court will not
18 examine Defendants' motions on the merits. The motion to remand is fully briefed. (Docs.
19 15, 21.) Neither party has requested oral argument, and the Court finds this matter is
20 appropriate for consideration without oral argument. (Docs. 13, 15, 21.) This matter was
21 referred to the undersigned United States Magistrate Judge for report and recommendation.
22 (Doc. 18.) For the reasons set forth below, it is recommended that the District Court, after
23 its independent review, grant Plaintiff's Motion to Remand (Doc. 13), remand this matter
24 back to the state court and deny the remaining motions as moot.¹

25 **FACTUAL BACKGROUND**

26 The factual allegations come from the Complaint. The Court will accept them for
27 the limited purpose of this motion. On March 12, 2020, Plaintiff's wife, Judy, underwent
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¹ If the District Judge disagrees, the undersigned will considerate of the pending motions.

1 surgery at Banner University Medical Center. (Doc. 1-3 at 6.) Dr. David Bull, the surgeon,
 2 used a ReliaCatch retrieval bag made by Defendants. *Id.* The bag caused a tear in Judy's
 3 left pulmonary artery. *Id.* at 6-7. Judy died as a result. *Id.* at 7. Plaintiff is a citizen of
 4 Arizona. *Id.* at 5.

5 In 2021, Plaintiff sued the Arizona Board of Regents and the State of Arizona in the
 6 Superior Court of the State of Arizona Pima County under the case number C20211049.
 7 *Id.* at 35. On March 10, 2022, Plaintiff initiated suit against Defendants in this action, again
 8 in state court. *Id.* at 3. The case number was C20220934. *Id.* at 2. The next day, Plaintiff
 9 sued Dr Bull and Geena Wu, M.D., and their spouses. *Id.* at 36. This case was assigned the
 10 case number C20220957. *Id.* Dr. Bull is also a citizen of Arizona. (Doc. 13 at 6.)

11 On April 13, 2022, Plaintiff moved for the state court to consolidate the three cases.
 12 (Doc. 1-3 at 35.) On May 2, 2022, the Honorable Kyle Bryson ordered the three actions
 13 "consolidated into case number C20211049 for all further proceedings." *Id.* at 58-59.² The
 14 state court further ordered that "all pleadings from C20220934 and C20220957 be
 15 transferred to C20211049." *Id.* at 59. On May 11, 2022, Plaintiff served Defendants in this
 16 matter. *Id.* at 39, 41, 43, 45, 47, 53. On June 9, 2022, Defendants filed a notice of removal
 17 for C20220934. (Doc. 1.)

18 On June 28, 2022, Plaintiff filed a timely motion to remand this matter back to the
 19 state court. (Doc. 13.) Plaintiff argues the removal of C20220934 was inappropriate
 20 because the matter had been merged with C20211049 for "all further proceedings." *Id.* at
 21 6. Additionally, Defendants would be unable to remove C20211049 because the matter
 22 would lack complete diversity, and the Eleventh Amendment of the United States
 23 Constitution prevent removal. *Id.*

24 LEGAL STANDARD

25 "Federal courts are courts of limited jurisdiction. They possess only that power
 26 authorized by Constitution and statute" *Kokkonen v. Guardian Life Ins. Co. of Am.*,

27 ² Plaintiff argued Defendants failed to provide the consolidation order to the Court. (Doc.
 28 13 at 7.) Further, Plaintiff stated he would attach the order to his motion. *Id.* First,
 Defendants did provide the consolidation order. (Doc. 1-3 at 58-59.) Second, Plaintiff
 failed to attach any such exhibit to the motion. This error was not corrected. (*See* Doc. 21.)

1 511 U.S. 375, 377 (1994) (citations omitted). The party asserting jurisdiction in a United
 2 States District Court has the burden of demonstrating jurisdiction. *Canela v. Costco*
 3 *Wholesale Corp.*, 971 F.3d 845, 849 (9th Cir. 2020). Courts "strictly construe the removal
 4 statute against removal jurisdiction." *City & Cnty. of Honolulu v. Sunoco LP*, 39 F.4th
 5 1101, 1106 (9th Cir. 2022) (quoting *Hansen v. Grp. Health Coop.*, 902 F.3d 1051, 1056-57
 6 (9th Cir. 2018)). Should the party asserting jurisdiction fail to carry their burden, courts
 7 will presume it lacks jurisdiction over the matter. *Kokkonen*, 511 U.S. at 377.

8 "The general removal statute, 28 U.S.C. § 1441(a), provides that 'any civil action'
 9 over which a federal court would have original jurisdiction may be removed to federal
 10 court by 'the defendant or the defendants.'" *Home Depot U.S.A., Inc. v. Jackson*, 139 S. Ct.
 11 1743, 1745 (2019). For example, district courts have original jurisdiction under diversity
 12 jurisdiction. 28 U.S.C. § 1332. Diversity jurisdiction requires an amount in controversy
 13 exceeding \$75,000 and diverse citizenship between parties. *Id.* Diverse citizenship means
 14 complete diversity between all named plaintiffs and all named defendants. *Lincoln Prop.*
 15 *Co. v. Roche*, 546 U.S. 81, 84 (2005). Removal of a case based on diversity jurisdiction
 16 has some additional caveats that are not relevant here. *See Home Depot U.S.A., Inc.*, 139
 17 S. Ct. at 1746-47 (describing year limitation and if any defendant is a citizen of the state).
 18 When considering removal jurisdiction following a state consolidation, federal courts must
 19 examine how the consolidation would be viewed under state law and whether the state
 20 court would treat the consolidate matter "as if only one complaint had originally been
 21 filed." *Bridewell-Sledge v. Blue Cross of Cal.*, 798 F.3d 923, 925 (9th Cir. 2015).

22 DISCUSSION

23 Plaintiff argues Judge Bryson merged the three cases into one case, such that
 24 Defendants could only remove the entire consolidated matter or nothing. (Doc. 13 at 6.)
 25 Moreover, the consolidated matter could not be removed because the matter would lack
 26 complete diversity and further the Eleventh Amendment would prevent removal. *Id.* The
 27 Court agrees that the entire consolidated matter would not be removable. Dr. Bull and
 28 Plaintiff are citizen of Arizona, such this matter would lack complete diversity. *See Lincoln*

1 *Prop. Co.*, 546 U.S. at 84. Thus, the Court need not consider whether the State of Arizona
2 had waived sovereign immunity.

3 Defendants assert that C20220934 maintained its separate identity after
4 consolidation and thus was individually removable. (Doc. 15 at 4-6.) This Court is guided
5 by how Arizona would consider the consolidated matter and disagrees with Defendants.

6 Under the Federal Rules of Civil Procedure, it is well established that consolidation
7 does not merge two separate matters into one. *See Hall v. Hall*, 138 S. Ct. 1118, 1131
8 (2018) (when one of several consolidated cases is decided, it is immediately appealable).
9 However, the Court of Appeals of Arizona recently considered consolidated actions as "a
10 single judicial unit for purposes of Rule 54(b) when the consolidation is clearly unlimited
11 and the actions could originally have been brought as a single suit." *Powers Reinforcing*
12 *Fabricators, L.L.C. v. Contes in & for Cnty. of Maricopa*, 473 P.3d 714, 719 (Ariz. Ct.
13 App. 2020) (quoting *Ringwald v. Harris*, 675 F.2d 768, 771 (5th Cir. 1982)). Thus, when
14 one of several consolidated matters is resolved, it is not necessarily immediately
15 appealable. *Id.* Therefore, in Arizona, cases can be consolidated such that they lose their
16 individual identity.

17 In California, when actions are consolidated "for all purposes," merged into one case
18 number, result in one verdict or judgment, then courts treat them as if they were filed
19 together originally. *Bridewell-Sledge*, 798 F.3d at 930. These are suitable considerations
20 for when a consolidated matter is treated as one judicial unit.

21 Here, Judge Bryson ordered the matters consolidated "for all further proceedings."
22 (Doc. 1-3 at 58.) He also ordered the pleadings from the 2022 cases transferred into the
23 2021 case. *Id.* at 59.

24 Thus, the state court the consolidated cases such that it would view them as if they
25 had been filed together. *See Bridewell-Sledge*, 798 F.3d at 930; *Powers Reinforcing*
26 *Fabricators, L.L.C.*, 473 P.3d at 719. Because the entire consolidate case cannot be
27 removed, this matter must be remanded back to the state court.

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RECOMMENDATION

For the foregoing reasons, it is **RECOMMENDED** that the District Court, after its independent review, grant Plaintiff's Motion to Remand (Doc. 13), remand this matter to the Superior Court of the State of Arizona Pima County, and deny the remaining motions as moot.

Pursuant to Federal Rule of Civil Procedure 72(b)(2), any party may serve and file written objections within fourteen days of being served with a copy of the Report and Recommendation. A party may respond to the other party's objections within fourteen days. No reply brief shall be filed on objections unless leave is granted by the district court. Failure to timely file objections to any factual or legal determination of the Magistrate Judge may be considered a waiver of a party's right to de novo consideration of the issues. *See United States v. Reyna-Tapia*, 328 F.3d 1114, 1121 (9th Cir. 2003).

Dated this 14th day of September, 2022.

A handwritten signature in black ink, appearing to read "D. Thomas Ferraro", is written over a horizontal line.

Honorable D. Thomas Ferraro
United States Magistrate Judge